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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PATRICIA LYNN GOMEZ, Defendant and Appellant.	B155854 (Super. Ct. No. NA047612)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles D. Sheldon, Judge. Affirmed.

Marylou Hillberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L. Mar and Ellen B. Kehr, Deputy Attorneys General, for Plaintiff and Respondent.

Patricia Lynn Gomez appeals the judgment entered after conviction by jury of voluntary manslaughter in which she personally used a dangerous or deadly weapon. (Pen. Code, §§ 192, subd. (a), 12022, subd. (b)(1).) [1] The trial court sentenced Gomez to seven years in state prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the rule of appellate review, the evidence established that in the early morning hours of December 28, 2000, Gomez and her long-time friend, Arthur Kuaea, were drinking at a small bar near Ship's Inn, a residential hotel in San Pedro where Gomez lived. Toward closing time, the bartender heard Gomez insisting that Gomez had given Kuaea a $10 bindle of methamphetamine but Kuaea denied he had received it. Gomez, who was intoxicated, said to Kuaea, "I can't believe that you are going to do me like this, that you are going to disrespect me." When Kuaea left the bar, Gomez said, "I can't believe it. I'll get you."

Gomez returned to the Ship's Inn with Patricia Lucio. Lucio testified Gomez complained loudly about the perceived injustice. Peanut, a gang member with a propensity for violence who frequented the Ship's Inn, overheard Gomez and offered to inquire of Kuaea, who was in another room of the Ship's Inn. Peanut returned and reported that Kuaea denied Gomez had given him any methamphetamine. Gomez continued to protest. Lucio made a remark that caused Gomez to call her a troublemaker.

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[1] Subsequent unspecified statutory references are to the Penal Code.

Peanut physically threw Lucio into the alley behind the Ship's Inn. As Gomez continued to complain, Estella Alvarez, a resident of the hotel, struck Gomez in the temple and told Gomez to shut up. A second female emerged from behind Peanut and said Gomez should return the $10. The second female knocked Gomez into a Christmas tree. Both females set upon Gomez and pummeled her with fists.

Jose Caceres, the manager of the Ship's Inn, was awakened by an argument outside Caceres' room. When the commotion ended, Kuaea knocked on Caceres' door, apologized for awakening Caceres and asked Caceres to open the front door of the hotel, which was locked to exclude visitors after 10 p.m. As Caceres asked Kuaea to respect the hotel rules, Gomez came "from nowhere," and stabbed Kuaea forcefully in the chest "straight [in]to his heart" with a long kitchen knife. Gomez said, "This is for you, mother-fucker." Kuaea collapsed on Caceres and died at the scene. The stab wound, which was seven inches deep, fractured the third rib on Kuaea's left side and passed through his lung, pericardial sac, pulmonary artery and ascending aorta.

2. *Defense evidence.*

Gomez testified in her own defense that she drank prodigious amounts of alcohol in the 36 hours preceding this incident. At the bar, Kuaea, Gomez's friend of long standing whom she viewed as a brother, gave Gomez $10 and asked Gomez to get some methamphetamine for a friend. Kuaea said he hoped Gomez did not "rip off" his friend. When Gomez returned to the bar half an hour later, she gave the bindle to Kuaea to demonstrate her honesty. Shortly thereafter, Gomez approached Kuaea's friend and

asked for $2. Kuaea's friend said he never got the methamphetamine. Kuaea's friend wanted more methamphetamine, not repayment, but Gomez was upset by Kuaea's betrayal. Gomez admitted she confronted Kuaea about the bindle at the bar but denied she threatened Kuaea.

Gomez returned to the Ship's Inn where she discussed the matter with Peanut and was beaten by two females. Gomez suspected the females were acting at the behest of Peanut. Gomez went to her room after the beating and saw Kuaea in the hotel with Peanut. Gomez remained determined to learn why Kuaea was mistreating her. Gomez obtained a large knife to prevent the two females from attacking her while she spoke to Kuaea. Gomez went to the area of the manager's office, faced Kuaea with the knife in her right hand and asked why Kuaea was doing this to her. Gomez admitted that she talks with her hands and thus may have had been waving the knife over her head. Peanut demanded the knife and grabbed Gomez from behind to disarm her. When he did, Peanut pushed Gomez into Kuaea. Gomez tried to push Kuaea out of the way but the knife plunged into Kuaea's chest. Peanut took the knife from Gomez and the two females again beat Gomez.

Booking photographs of Gomez showed bruises around her right and left eye, scratches on her wrist and redness in her face, neck and shoulder.

3. *Jury instructions and verdict.*

The trial court instructed the jury on murder, heat of passion, voluntary intoxication and accident or misfortune. The jury found Gomez not guilty of murder but

convicted her of voluntary manslaughter with the personal use of a deadly weapon, a knife.

CONTENTION

Gomez contends the trial court erroneously refused to instruct the jury on self-defense.

DISCUSSION

1. *The evidence did not support instruction on self-defense.*

The trial court refused Gomez's request for instructions on self-defense. Gomez contends self-defense was an issue in this case because she was beaten moments before she went to get the knife and she brought the knife to the scene of the fatal incident only for protection. (*People v. Elize* (1999) 71 Cal.App.4th 605, 616.) Gomez asserts she was entitled to arm herself and was entitled to act more quickly and take harsher measures than an individual who had not previously had been beaten by the females. Gomez argues that because the doctrine of transferred intent applies to self-defense (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1023-1024), it does not matter that Kuaea, rather than Peanut or the females, was harmed. Gomez summarizes her contention as follows: "If a third person is accidentally injured because a person has armed themselves [*sic*] in a reasonable belief in the need [for] self-defense, the intent to kill is . . . negated and [self] defense should apply." Gomez claims omission of these instructions requires reversal under *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705].

In the reply brief, Gomez claims the jury also should have been instructed on the lesser included offense of involuntary manslaughter based on the commission of misdemeanor brandishing. (*In re Christian S.* (1994) 7 Cal.4th 768, 780.)

The law to be applied is well settled. A trial court must instruct on the general principles of law relevant to the issues raised by the evidence that are necessary for the jury's understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This obligation requires the trial court to instruct on all lesser included offenses supported by substantial evidence. (*People v. Breverman, supra,* at pp. 154-155, 162; *People v. Barton* (1995) 12 Cal.4th 186, 195.)

"In the case of *defenses*, . . . a sua sponte instructional duty arises 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' " (*People v. Breverman, supra,* 19 Cal.4th at p. 157.) To be acquitted of responsibility for a person's death based on self-defense, the defendant must have acted pursuant to an actual and reasonable belief in the need to defend under circumstances that would lead a reasonable person to fear the imminent infliction of death, or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083; *People v. Watie* (2002) 100 Cal.App.4th 866, 876.)

Here, there was no substantial evidence that Gomez acted in self-defense. Gomez did not testify, and the evidence did not suggest, that Gomez stabbed Kuaea in an unsuccessful attempt to defend herself from Peanut or the two females. Although self-

defense may have been "in the air," so to speak, it was not involved in the fatal incident. The testimony of the manager, who saw the stabbing, suggested an intentional killing with Gomez coming out of nowhere and stabbing Kuaea so forcefully in the chest as to break one of his ribs. Gomez's testimony suggested an accident caused by Peanut's attempt to disarm her.

Contrary to Gomez's assertion, the fact Gomez may have been entitled to arm herself before returning to the scene of her beating does not mean the fatal incident involved self-defense. Even if the act of resisting Peanut's attempt to take the knife is seen as having been undertaken to further the plan of self-defense, the actual stabbing of Kuaea was not something Gomez did in self-defense. Gomez testified it was an accident caused by force applied by Peanut, not Gomez. Because the evidence does not suggest that Gomez intended to stab either Peanut or the two females in self-defense but stabbed Kuaea instead, the trial court's refusal to instruct on self-defense was not error.

People v. Elize, supra, 71 Cal.App.4th 605, the case relied upon by Gomez, does not require a different result. In *Elize*, the defendant's wrist was broken in an angry confrontation with two women armed with pipes. The defendant testified his gun fired accidentally while he and one of the women struggled over the gun. The trial court refused to instruct on self-defense because the defendant testified the shooting was an accident. The jury convicted the defendant of assault with a firearm. *Elize* found the jury could have disbelieved the defendant's testimony and found the defendant fired the gun intentionally, either "to hit one of the women or to shock them into breaking off their

attack." (*People v. Elize, supra,* at p. 610.) Because there was evidence from which the jury could conclude the defendant fired the gun in self-defense and not accidentally, the trial court had a sua sponte obligation to instruct on that theory.

However, as previously discussed, there was no evidence in this case that Gomez may have stabbed Kuaea in an attempt to defend herself. The evidence in this case suggested either an intentional homicide or an accident caused by Peanut attempting to disarm Gomez. *Elize* is therefore factually distinguishable.

Finally, we reject Gomez's belated assertion the trial court should have instructed the jury on involuntary manslaughter based on misdemeanor brandishing. Brandishing is inapplicable where the accused acts in self-defense. [2] Here, Gomez, by her own argument, was entitled to arm herself with a knife before she returned to the hallway where she had been beaten. Thus, merely returning to the scene of the beating with the knife did not constitute brandishing.

Additionally, a trial court need only instruct on lesser included offenses if there is substantial evidence of the lesser offense. " 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . .

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[2] Section 417 provides that "[e]very person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a deadly weapon other than a firearm in any fight or quarrel is guilty of a misdemeanor . . . ." (§ 417, subd. (a)(1).)

conclude . . . ” ’ that the lesser offense, but not the greater, was committed. [Citations].” (*People v. Breverman, supra,* 19 Cal.4th at p. 162.)

Here, there was insufficient evidence from which a reasonable jury could have concluded that Kuaea’s death was the result of Gomez’s brandishing the knife. As has been noted, the killing was either intentional or an accident caused by Peanut. Thus, even had the jury been instructed on brandishing, there is no reasonable probability Gomez would have been convicted of involuntary manslaughter. (*People v. Breverman, supra,* 19 Cal.4th at p. 176; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Accordingly, even if error is assumed for the sake of discussion, reversal is not required.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.